

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs March 28, 2007

STATE OF TENNESSEE v. NICHOLAS KELLY WEBSTER

Direct Appeal from the Criminal Court for Hamilton County
No. 243501 Don W. Poole, Judge

No. E2006-00863-CCA-R3-CD - Filed May 23, 2007

The Defendant, Nicholas Kelly Webster, pled guilty to especially aggravated burglary and accessory after the fact. The trial court imposed an agreed eight-year sentence, but it denied the Defendant's request for probation or an alternative sentence. The Defendant appeals, contending that the trial court erred when it denied him probation or an alternative sentence. Concluding there exists no error, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, Jr., and J.C. McLIN, JJ., joined.

David R. Barrow (at guilty plea and sentencing) and Clayton Whittaker (on appeal), Chattanooga, Tennessee, for the appellant, Nicholas Kelly Webster.

Robert E. Cooper, Jr., Attorney General and Reporter; John H. Bledsoe, Assistant Attorney General; William H. Cox, III, District Attorney General; Neal Pinkston, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Facts

At the guilty plea hearing, where the Defendant offered a guilty plea to especially aggravated burglary and to accessory after the fact, the State told the court that had the case gone to trial the evidence would have proven the following:

[T]here was a third co-defendant involved in this situation by the name of Timmy McDaniel. Mr. McDaniel is currently serving a life-in-prison sentence, without parole, on a felony murder. And if the matter had gone to trial, the State believes [it] would show on December 7th of 2002, Mr. Gray and [the Defendant] and Mr. McDaniel left Tunnel Hill, Georgia, in a late-model Ford vehicle, not titled in [the

Defendant's] name, but I think the proof would show that he drove it pretty consistently.

They drove from Tunnel Hill up to the Mountain Shadows Subdivision here in Chattanooga, in the East Brainerd area, and the mode that night, as the statements from both of the individuals would later show, was to do burglaries; in their own words, to make easy or quick money.

They attempted to do one burglary that night in the subdivision but w[ere] not successful, they then drove to the home of Mary Lou Wojcik, who lived in Mountain Shadows, and at that time, Mr. McDaniel got out of the vehicle and broke into the house.

While he broke into the house, [the Defendant] and Mr. Gray drove around the subdivision and a 911 call between the hours of one and two a.m. on December the 8th, indicated a suspicious truck in the neighborhood, it's an old truck, it's very loud, and some neighbors called. And before police arrived, Mr. McDaniel had returned from the house, gotten into the truck and they left.

And before entering the house, and I'll quote, Your Honor, and no disrespect to the Court, Mr. McDaniel mentioned, "If the bitch is in there, I'll have to kill her." That was made known to both of these defendants. . . . [He said this] [b]efore leaving the truck. Approximately 20 minutes later, he returned, and Mr. Gray's statement would admit that Mr. McDaniel had blood on his hands and blood on his shoes.

They left and went back to Tunnel Hill. Mr. McDaniel was in the home for approximately 20 minutes. And the State also feels, from the statements, that Mr. McDaniel, upon returning to the truck, before leaving the subdivision, announced to the [D]efendant that he had indeed killed the lady, the individual, Ms. Wojcik. She was found the following Monday morning by Ms. Mary Beth Clark. She was brutally murdered. Stab wounds generally to the neck and abdomen region, some three and a half inches deep, as long as nine inches across. Stab wound to the abdomen, pierced the heart, multiple rib fractures, and proof would also show a post mortem sexual violation.

There w[ere] no suspects at this time. Tips later led, approximately around December the 12th, to [the Defendant] and Mr. Gray. They were taken into custody at that time and gave statements. But the State feels the proof would show that these two individuals, we feel, did not know that Mr. McDaniel entered the home probably with the intent to murder Ms. Wojcik.

It will be known that when they left Tunnel Hill, that Mr. McDaniel was in possession of a pry bar that was used to enter the home. The back door next to the

garage showed signs of forced entry and he also entered the home with a knife, but we feel these two individuals did not know that he entered with the intent to murder Ms. Wojcik.

However, at a minimum, the State feels that both individuals knew, upon returning to the truck, as to what had happened, and for approximately a week, they heard about on the news, newspaper, made no mention to the authorities the fact they were there and that Mr. McDaniel, as they later learned, had murdered Ms. Wojcik.

. . . .

And we also feel [the Defendant], in his statement, made a mention that on the ride up there they had talked about doing burglaries, and he also mentions later about the knife that Mr. McDaniel had and seen it.

And witnesses will also say, if the matter had gone to trial, that when they returned, on the early morning hours of December 8th to the 230 Norton Lane, which is where Mr. Gray resided and where they all left from, that the three individuals, two before the Court and Mr. McDaniel, entered the home, washed their hands and then were later seen outside later that night, early morning hours, burning what later was determined to be clothes; there were remnants of clothes found in a very noticeable burn spot in the yard of Mr. Gray. Tools were recovered in a shed behind the home, as well as the murder weapon.

After this articulation of the facts, the Defendant offered, and the trial court accepted, his plea of guilty. The parties agreed to an eight-year sentence, leaving the manner of service of the sentence to be determined by the trial court.

Subsequently, a sentencing hearing was held at which the following evidence was presented: Detective Robert Starnes, with the Hamilton County Sheriff's Department, testified that on December 9, 2002, he was assigned to investigate the death of Mary Lou Wojcik. The detective provided a summary of the facts leading to the burglary and murder of Ms. Wojcik. He then said that the police received information from a confidential informant, which led them to the Defendant, McDaniel, and Gray. As part of this investigation, the detective reviewed the Defendant's statement to police, in which the Defendant said, in part, that he dropped McDaniel off at the house, and when McDaniel returned he said "the bitch is dead." He also said that he saw McDaniel throw a black knife over the shed at Gray's house and heard it land in the woods. McDaniel later cooperated with police and led them to where the knife was buried behind a shed. Detective Starnes testified that the Defendant did not assist police in finding the murder weapon.

Detective Starnes testified that the Defendant was not completely honest about everything that had taken place and that he minimized his involvement, including failing to mention that he assisted in disposing of the bloody clothing. After the Defendant was in custody, he did not assist

police in finding McDaniel.

On cross-examination, the detective agreed that McDaniel said that the Defendant never went into the house. Further, he learned that Mr. McDaniel knew the Wojcik family because McDaniel had dated the victim's daughter.

Mary Beth Clark testified that she had been Ms. Wojcik's neighbor and best friend for thirteen years. She said that she discovered Ms. Wojcik's body after Ms. Wojcik's sister had called Clark and said that she was concerned that Ms. Wojcik had not returned her phone calls. After Ms. Wojcik's sister called Clark, Clark went to check on Ms. Wojcik and found the gruesome scene. Clark said that she can rarely close her eyes without seeing it. Clark described how this incident had impacted her, her family, and Wojcik's family. On cross-examination, Clark testified that she had spoken with Ms. Wojcik about McDaniel and that there was strife caused by Ms. Wojcik's daughter dating McDaniel.

The Defendant testified that he had known McDaniel only a couple of weeks before the murder and that he had met McDaniel through Gray. He said that Gray asked him to give Gray and McDaniel a ride to McDaniel's girlfriend's house because his girlfriend was going to let him borrow some money. The Defendant testified he had never gone anywhere with Gray and McDaniel prior to this event. The Defendant went to Gray's house in a truck that he borrowed from his neighbor. The truck had a hole burned in the exhaust, which made it extremely loud. After the Defendant picked up Gray and McDaniel, they stopped and got gas for the truck, for which McDaniel paid. The Defendant said that McDaniel gave him directions, and on the way to the house the truck started acting up, and the Defendant had to tap the fuel filter to get the truck to run. The Defendant drove McDaniel to Ms. Wojcik's house, and McDaniel said only that he was going to go get the money for his brakes. McDaniel got out of the truck, went in, and they waited for him for ten or fifteen minutes. The Defendant testified he could not tell if McDaniel was carrying anything with him, and he had not seen McDaniel with any weapons.

The Defendant said he got tired of waiting so he started the truck and turned around. He was about to go home, but he waited for a few more minutes. He then attempted to leave the subdivision but could not find his way out. He drove around for ten or fifteen minutes, and then he passed by the house again and turned around and saw McDaniel coming from the house. The Defendant testified that McDaniel was humming as he got back in the truck and McDaniel said "the bitch is dead," but the Defendant did not think that McDaniel was serious.

On the way back to Gray's house, the Defendant was stopped by police because a brake light on the truck was not operating. The officer gave the Defendant a warning, and the Defendant went to Gray's house to drop off Gray and McDaniel. When going up Gray's driveway, the fuel line again became clogged. Noting that it was cold outside, the Defendant stopped the truck to work on it, and Gray and McDaniel went into the house. After the Defendant fixed the truck, he went inside Gray's house to wash his hands, and Gray and McDaniel told him that they had a fire burning, which was not unusual because Gray liked to sit and drink by the fire. Gray had a spot in the yard where he

always burnt pieces of wood and some garbage. The Defendant told Gray and McDaniel that he was leaving.

The Defendant testified that a couple of days after this incident, he went to Gray's house. McDaniel had a newspaper lying on the table, and he showed the Defendant what he had done. The Defendant testified that he was worried because he was not sure what had happened. The Defendant testified that he did not contact police because McDaniel told him that if anything was mentioned he would kill the Defendant and the Defendant's family. The Defendant went home shortly after that, and the police came to arrest him thirty minutes later. The police took the Defendant to Catoosa County, Georgia, where he gave a statement and offered to help the police look for the knife. He said that he assisted Catoosa County police officers looking around the shed and in the woods for the knife, but they did not find it.

On cross-examination, the Defendant denied that he was ever privy to a conversation about committing burglaries on the night of these crimes. He said that they did stop at a house before letting McDaniel out at the Wojcik's house but that they only stopped because his truck broke down. He again denied that there was any discussion of a burglary. The Defendant could not explain why he said in his statement that there was some discussion of a burglary. Later he said that the police coerced him into making that statement by telling him that, if he did not, he would be charged with first degree murder. The Defendant testified that he remembered only that it was dark outside when they went to the Wojcik's house to get the money, and he was not surprised that the 911 call about his truck was received at 1:00 a.m. He said he did not think it unusual that they were going to borrow money at such a late hour, explaining that he did not know McDaniel's relationship with his girlfriend.

The Defendant also denied that McDaniel mentioned killing anyone before he got out of the truck. He said he would be surprised if Gray had said that McDaniel had made any such statement. The Defendant said that he saw McDaniel walk up the steps to the front door, and he assumed that the Wojciks knew that he was coming over because the house was well lit. The Defendant said that he did not see any blood on McDaniel when McDaniel returned, and he was surprised that Gray said that Gray saw blood on McDaniel's hands. The Defendant recalled that McDaniel sang "the bitch is dead," but he thought that he was singing a rap song and was not alarmed.

The Defendant said he was outside working on the truck when Gray and McDaniel first went into Gray's house after the incident. He testified that he did not hear or see them washing their hands or a knife. He also denied ever seeing any clothing being burned and said that he only saw wood being burned in the fire. A few days later, the Defendant went back to Gray's house where McDaniel was working on a car. He said that he was using a knife to cut wires and had broken the knife. In anger, McDaniel threw the knife.

The Defendant testified that, while he thought it was important, he did not call police after he learned of this murder because he feared for himself and his family. The Defendant expressed some remorse. The Defendant again said that he did not learn of Wojcik's murder until the day he

was arrested.

Donna Collins, the Defendant's mother, testified that the Defendant should receive an alternative sentence because he has never been in trouble, he is a good child, and he always does for others. He did well in school and put others before himself. She testified about how the Defendant's children miss him and how their extended family misses him also. Betty Webster testified that she was in a car accident in 2001, and the Defendant quit working so that he could take care of her. Larry Webster, the Defendant's father, testified that the Defendant is a good worker and has always had a job. Webster said that the Defendant was the backbone of their family. Chris Brown, the Defendant's employer, testified that he was impressed with the Defendant's handling of a couple of situations involving angry customers.

Based upon this evidence the trial court found:

[The Defendant] is before the Court, having pled guilty to especially aggravated burglary with a sentence of eight years in the Department of Corrections and accessory after the fact with a sentence of two years in the Department of Corrections. Those sentences will be ordered to be served concurrently in keeping with the agreement that has been entered at this time.

We get into more difficult[y] in determining the appropriate sentence for these offenses. In doing this, the Court has considered the evidence presented at this sentencing hearing today. I have considered everything that was presented

Considered the presentence report, the sentencing principles. The Court has some guidance in regard to what an appropriate sentence will be, and we first look at Tennessee Code Annotated section 40-35-103, and the Court has done that.

The arguments made as to alternative punishments, or alternative sentences, and [the Defendant's attorney] has done that very effectively. The nature and characteristics of this offense, and I do find that this is a horrible, reprehensible violent offense as part of what [the Defendant] is here today for. All the evidence concerning enhancing and mitigating factors that have been brought forth, once again the statement made by the [D]efendant.

In regard to that, the Court finds as follows: As far as the range . . . [the Defendant is] a Range I standard offender He has no criminal record

. . . .

So the difficult thing we have with [the Defendant] is that he is admitting guilt, accepting responsibility in regard to especially aggravated burglary, but he, as was said, I guess, by Ms. Clark, things got started that resulted in this horrible,

horrifying death to a lady who certainly did not deserve to die. But the act of committing an especially aggravated burglary sets those wheels into operation.

The second thing that [the Defendant] has pled guilty to is accessory after the fact. He has pled guilty, he stands before this Court stating that I have done certain things which made it more difficult for Mr. McDaniel to be apprehended. And I find the facts to be borne out by what I've heard today, that there was a burning of certain things, that certainly with this horrible horrendous crime that was committed, there would have been blood. There would have been blood on Mr. McDaniel. I don't find it reasonable that [the Defendant said] that he saw nothing, that he knew nothing about the burning, that there was nothing which brought to his attention that this horrible crime had been committed.

So to a certain extent, [the Defendant] has accepted responsibility, but to a certain extent, for all the ramifications that occurred when these burglaries occurred or when houses were entered, I don't know that he has accepted responsibility for that.

. . . .

Alternative sentencing has been argued or whether there is a presumption. There is no presumption of alternative punishments insofar as it relates to a class B felony, that concerns itself with class C, D, and E. So [the Defendant] is before the Court today, and once again, the law helps us make these very difficult decisions. There is no presumption he is entitled to alternative sentences or alternative considerations. I don't find that, quite frankly, that he is.

I look at, when probation or alternative sentences are considered, under the law we must, the Court has to look at the facts and circumstances surrounding the offense and the nature and the circumstances of the criminal conduct involved. And if you look at that, then you would say that alternative sentences are not part of the law that we would have.

. . . .

The thing that I keep coming back to, when I look at whether alternative sentencing should be considered, is confinement is necessary to avoid depreciating the seriousness of the offense. And when I look at that, I really have no option, no alternative but to order that [the Defendant] serve his sentence.

The trial court ordered the Defendant to serve his sentence in confinement. It is from this judgment that the Defendant now appeals.

II. Analysis

The Defendant contends that the trial court erred when it denied his request for an alternative sentence. He asserts that the trial court improperly considered the elements of the offense to which he pled guilty when it denied him an alternative sentence. When a defendant challenges the length and manner of service of a sentence, it is the duty of this court to conduct a de novo review of the record with a presumption that “the determinations made by the court from which the appeal is taken are correct.” T.C.A. § 40-35-401(d) (2003).¹ This presumption is “conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances.” State v. Ross, 49 S.W.3d 833, 847 (Tenn. 2001); State v. Pettus, 986 S.W.2d 540, 543 (Tenn. 1999); State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). The presumption does not apply to the legal conclusions reached by the trial court in sentencing a defendant or to the determinations made by the trial court that are predicated upon uncontroverted facts. State v. Dean, 76 S.W.3d 352, 377 (Tenn. Crim. App. 2001); State v. Butler, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); State v. Smith, 891 S.W.2d 922, 929 (Tenn. Crim. App. 1994). In conducting a de novo review of a sentence, we must consider: (a) any evidence received at the trial and/or sentencing hearing; (b) the presentence report; (c) the principles of sentencing; (d) the arguments of counsel relative to sentencing alternatives; (e) the nature and characteristics of the offense; (f) any mitigating or enhancement factors; (g) any statements made by the defendant on his or her own behalf; and (h) the defendant’s potential or lack of potential for rehabilitation or treatment. See T.C.A. § 40-35-210 (2006); State v. Taylor, 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001). The party challenging a sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. T.C.A. § 40-35-401 (2003), Sentencing Comm’n Cmts.

If our review reflects that the trial court followed the statutory sentencing procedure, imposed a lawful sentence after having given due consideration and proper weight to the factors and principles set out under the sentencing law, and made findings of fact that are adequately supported by the record, then we may not modify the sentence, even if we would have preferred a different result. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). In the case under submission, the record demonstrates that the trial court properly considered relevant sentencing principles. Accordingly we apply the presumption that the trial court’s sentencing determinations are correct. See T.C.A. § 40-35-401(d).

In determining whether to grant or deny probation, the trial court may consider the following: the circumstances of the offense; the defendant’s criminal record; background and social history; the defendant’s physical and mental health; the deterrent effect on other criminal activity; and the likelihood that probation is in the best interests of both the public and the defendant. State v. Parker,

¹We note that on June 7, 2005, the General Assembly amended Tennessee Code Annotated sections 40-35-102(6), -114, -210, -401. See 2005 Tenn. Pub. Acts ch. 353, §§ 1, 5, 6, 8. However, the amended code sections are inapplicable to the Defendant’s appeal.

932 S.W.2d 945, 958 (Tenn. Crim. App. 1996). The Defendant bears the burden of establishing suitability for probation. T.C.A. § 40-35-303(b); Ashby, 823 S.W.2d at 169. Sentences involving confinement should be based upon the following considerations:

- (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
- (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
- (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

T.C.A. § 40-35-103 (2003). Additionally, the principles of sentencing reflect that the sentence should be no greater than that deserved for the offense committed and should be the least severe measure necessary to achieve the purposes for which the sentence was imposed. See T.C.A. § 40-35-103(2), (4). Further, the potential or lack of potential for the rehabilitation or treatment of the defendant should be considered in determining the sentence alternative or length of a term to be imposed. T.C.A. § 40-35-103(5).

In addition to consideration of the aforementioned factors, it is well established that “untruthfulness is a factor which may be considered in determining the appropriateness of probation.” State v. Robert Duff and Vernita Cox, No. 02C01-9307-CR-00152, 1995 WL 390951, at *3 (Tenn. Crim. App., at Jackson, June 28, 1995), *perm. app. denied* (Tenn. Nov. 6, 1995) (citing State v. Neeley, 678 S.W.2d 48, 49 (Tenn. 1984); State v. Bunch, 646 S.W.2d 158, 160 (Tenn. 1983)); *see also* State v. Raymond K. McCrary, No. E2003-02368-CCA-R3-CD, 2004 WL 2085364, at *4 (Tenn. Crim. App., at Knoxville, Sept. 17, 2004), *no perm. app. filed*. “Although untruthfulness is not mentioned as a factor in Tenn. Code Ann. § 40-35-103(1), this [C]ourt has continued to declare it a relevant factor in determining the suitability of probation subsequent to the enactment of the 1989 Act.” Duff, 1995 WL 390951, at *3 (citing State v. Anderson, 857 S.W.2d 571, 574 (Tenn. Crim. App. 1992)).

This Court has said:

In determining whether to grant or deny full probation, additional considerations include the defendant’s criminal record; social history and present condition of the defendant, including his or her mental and physical conditions where appropriate; defendant’s amenability to correction and general attitude, including behavior since arrest, home environment, current drug usage, emotional stability, past employment, general reputation, marital stability, family responsibility, and the best interest of both the Defendant and the public.

State v. Blackhurst, 70 S.W.3d 88, 97 (Tenn. Crim. App. 2001) (citations omitted). Failure to accept responsibility for one’s criminal conduct reflects poorly on rehabilitative potential when determining

whether alternative sentencing is appropriate in a particular case. State v. Zeolia, 928 S.W.2d 457, 463 (Tenn. Crim. App. 1996). Similarly, lack of candor and credibility reflect negatively on a defendant's potential for rehabilitation. Blackhurst, 70 S.W.3d at 98.

In the case under submission, the trial court found applicable factor (B) of Tennessee Code Annotated section 40-35-103(1), which states that confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses. In order to deny an alternative sentence based upon avoiding depreciating the seriousness of the offense, the circumstances of the offense as committed must be especially horrifying, shocking, reprehensible, offensive or otherwise of an excessive or exaggerated degree, and the nature of the offense must outweigh all other factors favoring a sentence other than confinement. Blackhurst, 70 S.W.3d at 98. We conclude that the trial court did not err when it found that the Defendant's actions were sufficiently reprehensible and offensive to deny him probation. After deciding that they would make some easy money by committing burglaries, the Defendant drove McDaniel to Wojcik's house. There, McDaniel brutally murdered Ms. Wojcik and sexually assaulted her corpse. The Defendant then drove McDaniel to Gray's house and helped to burn McDaniel's clothes. The Defendant saw McDaniel dispose of the murder weapon, and he failed to contact police after McDaniel showed him a newspaper article about the murder and told the Defendant that he had committed this crime. While the Defendant testified that he was unaware that McDaniel intended to commit a burglary, he did not see blood on McDaniel after the murder, and he did not know that the knife was used in the murder, the trial court found this testimony unpersuasive. We conclude that the evidence does not preponderate against the trial court's denial of an alternative sentence.

III. Conclusion

In accordance with the foregoing reasoning and authorities, we affirm the trial court's denial of an alternative sentence.

ROBERT W. WEDEMEYER, JUDGE